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4 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
5 AT SEATTLE

6 CAVE MAN KITCHENS INC.,

7 Plaintiff,

8 v.

9 CAVEMAN FOODS, LLC,

10 Defendant.

C18-273 TSZ

ORDER

11 THIS MATTER comes before the Court on defendant Caveman Foods, LLC's  
12 motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and/or  
13 12(b)(6), or alternatively to transfer this case to the Northern District of California,  
14 docket no. 13. Having reviewed all papers filed in support of, and in opposition to, the  
15 motion,<sup>1</sup> the Court enters the following order.

16 **Discussion**

17 Plaintiff Cave Man Kitchens Inc. alleges that it is a Washington "limited liability  
18 corporation" headquartered in Kent, Washington. Compl. at ¶ 2 (docket no. 1). In  
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20 <sup>1</sup> The parties have submitted materials outside the pleadings, of which the Court takes judicial notice  
21 pursuant to Federal Rule of Evidence 201, without converting defendant's motion into one for summary  
22 judgment. *See* Fed. R. Civ. P. 12(d); *see also Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007)  
(in ruling on a motion to dismiss, a court may consider the allegations in the pleadings, any exhibits that  
23 are attached to the complaint, and any matters properly subject to judicial notice, as well as documents  
referenced but not explicitly incorporated in the complaint whose authenticity is unquestioned).

1 Washington, an entity may be a corporation or a limited liability company (“LLC”); it  
2 cannot be a limited liability corporation. See RCW 23.95.305. If an entity is an LLC, its  
3 name may not contain the abbreviation “Inc.” Id. at ¶ (5)(a)(ii). Contrary to the assertion  
4 in the operative pleading, plaintiff is a corporation, not an LLC, and it was formed on  
5 June 6, 2011. See Ex. E to Request for Judicial Notice (docket no. 15-5).

6 Plaintiff’s allegation that it has used the marks CAVE MAN and CAVEMAN in  
7 connection with restaurant and catering services continuously since December 21, 1971,  
8 see Compl. at ¶ 7 (docket no. 1), is inconsistent with the date on which plaintiff was  
9 incorporated, almost forty years later. Plaintiff acknowledges that an entirely different  
10 entity used and owned the mark CAVE MAN KITCHENS from 1971 until either 2010,  
11 when the other business unsuccessfully sought discharge in bankruptcy,<sup>2</sup> or 2011, when it  
12 was administratively dissolved by the Washington Secretary of State. See Donley Decl.  
13 at ¶¶ 3-5 (docket no. 18-1); see also Exs. A & C to Request for Judicial Notice (docket  
14 nos. 15-1 & 15-3). At the time this lawsuit was commenced, plaintiff did not own the  
15 registered mark CAVE MAN KITCHENS, upon which all of its claims (and its alleged  
16 priority date) are based.

17 Plaintiff’s lack of standing is evidenced by Registration No. 3,222,887 for the  
18 service mark CAVE MAN KITCHENS, dated March 27, 2007, Ex. A to Compl. (docket  
19 no. 1-1), which was over four years before plaintiff even existed; plaintiff cannot be the  
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22 <sup>2</sup> The mark CAVE MAN KITCHENS was not disclosed as an asset in the bankruptcy proceedings. See  
23 Ex. M to Supp. Request for Judicial Notice (docket no. 21).

1 entity to which the registration was granted. On May 30, 2018, after defendant had  
2 moved to dismiss this matter for inter alia lack of standing on plaintiff's part, an  
3 "Assignment Nunc Pro Tunc" in favor of plaintiff was executed by the president of the  
4 long defunct entity that had registered the mark CAVE MAN KITCHENS. See Ex. A to  
5 Stuart Decl. (docket no. 18-3). This attempted assignment fails to establish that, at the  
6 time this case was filed, plaintiff had legal title to the intellectual property at issue. See  
7 Gaia Techs., Inc. v. Reconversion Techs., Inc., 93 F.3d 774, 780 (Fed. Cir. 1996)  
8 ("[P]arties should possess rights before seeking to have them vindicated in court . . . .  
9 Permitting non-owners and licensees the right to sue, so long as they eventually obtain  
10 the rights they seek to have redressed, would enmesh the judiciary in abstract disputes,  
11 risk multiple litigation, and provide incentives for parties to obtain assignments in order  
12 to expand their arsenal and the scope of litigation. Inevitably, delay and expense would  
13 be the order of the day." (emphasis added, quoting Procter & Gamble Co. v. Paragon  
14 Trade Brands, Inc., 917 F. Supp. 305, 310 (D. Del. 1995))); see also Skaff v. Meridien  
15 N. Am. Beverly Hills, LLC, 506 F.3d 832, 838 (9th Cir. 2007) ("The existence of standing  
16 turns on the facts as they existed at the time the plaintiff filed the complaint.").

17 When plaintiff initiated this action on February 22, 2018, it lacked standing to  
18 assert the claims that it brings under the Lanham Act, and those claims (Counts I, II, V,  
19 VI, VII, VIII, and IX) are therefore DISMISSED without prejudice for lack of subject  
20 matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). See Cetacean  
21 Cnty. v. Bush, 386 F.3d 1169, 1174 (9th Cir. 2004) ("A suit brought by a plaintiff  
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1 without Article III standing is not a ‘case or controversy,’ and an Article III federal court  
2 therefore lacks subject matter jurisdiction over the suit.”).

3 The Court DECLINES to exercise supplemental jurisdiction over plaintiff’s state  
4 law claims. See 28 U.S.C. § 1367(c)(3). In light of these rulings, the Court need not and  
5 does not address defendant’s other grounds for dismissal or its alternative request for  
6 transfer.

7 **Conclusion**

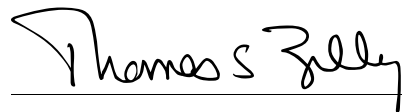
8 For the foregoing reasons, the Court ORDERS:

9 (1) Defendant’s motion to dismiss, docket no. 13, is GRANTED. Plaintiff’s  
10 Lanham Act claims are DISMISSED without prejudice for lack of subject matter  
11 jurisdiction. The Court DECLINES to exercise supplemental jurisdiction as to plaintiff’s  
12 state law claims.

13 (2) The Clerk is DIRECTED to CLOSE this case and to send a copy of this  
14 Order to all counsel of record.

15 IT IS SO ORDERED.

16 Dated this 28th day of August, 2018.

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19 Thomas S. Zilly  
20 United States District Judge  
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